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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FCC 05M-38  
04616

<b>In the Matter of</b>	)	<b>EB Docket No. 04-381</b>
	)	
<b>Florida Cable Telecommunications</b>	)	
<b>Association, Inc.; Comcast Cablevision of</b>	)	
<b>Panama City, Inc.; Mediacom Southeast,</b>	)	
<b>L.L.C.; and Cox Communications Gulf,</b>	)	
<b>L.L.C.,</b>	)	
	)	
<b>Complainants,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>Gulf Power Company,</b>	)	
	)	
<b>Respondent.</b>	)	

**DISCOVERY ORDER**

**Issued:** August 4, 2005

**Released:** August 5, 2005

**PRELIMINARY STATEMENT**

By a preponderance of the evidence:

[B]efore [Gulf Power] can seek compensation above marginal cost, it must show *with regard to each pole* that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations.

*HDO* at Para. 3.<sup>1</sup> (Emphasis added.)

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<sup>1</sup> *Hearing Designation Order*, EB Docket No. 04-381 (DA 04-3048), released September 27, 2004 (“*HDO*”).

The burdens of proceeding and proof were assigned:

*Gulf Power - - - bears the burden of proceeding with the introduction of evidence and the burden of proving it is entitled to compensation above marginal cost with respect to specific poles.*

*HDO*, Para. 8. (Emphasis added.)

The issue requesting discovery is identifying “full capacity” on a pole by pole basis on utility poles that are owned or controlled by Gulf Power in the State of Florida. To qualify to charge rates that exceed the FCC Formula, Gulf Power must – as a condition precedent – identify “specific poles” to which Complainants CATV are attached that Gulf Power contends are fully utilized.

Gulf Power also must provide convincing reasons for considering identified poles to be “fully utilized”. See *APCo v. F.C.C.*, 311 F 3d 1357, 1370-71 (11<sup>th</sup> Cir. 2002) (power company must prove “with regard to each pole” that the pole is at full capacity). See also *Gulf Power Order*, 18 FCC Rcd 9599 (2003).

Complainants are particularly focused on the Description of Evidence filed by Gulf Power in December 2004, to be supplemented by the Pole Attachment Survey (“Survey”) currently being conducted for Gulf Power by its consultant Osmose, Inc. The Description of Evidence describes the core of evidence that Gulf Power contends is sufficient to prove its case for damages. Gulf Power now represents that it has produced to Complainants the evidence referred to or relied on in its Description of Evidence.

The Survey was authorized to help meet the exacting standard of proof of *APCo*, *supra*, and to “fill in gaps” of the evidence referred to in the Description of Evidence. See *Status Order*, FCC 05M-23, released April 15, 2005. See also *Order FCC 04M-41*, released December 15, 2004 (burden of proof and standards of evidence and pole survey).

### **Current Discovery**

February 1, 2005, was the date set for commencing interrogatory and document discovery. *Order FCC 04M-42*, released December 15, 2004, and Complainants met that date. On motion request, Gulf Power was granted an extension to file response to discovery to March 17, 2005. *Order FCC 05M-10*, released March 3, 2005. A further extension requested by Gulf Power was granted, and the date for exchanging answers and objections was extended to April 18, 2005. *Order FCC 05M-18*, released April 1, 2005. Complainants requested more time to file motions to compel answers to interrogatories and requests for documents, and additional time was permitted to May 23, 2005. *Order FCC 05M-25*, released/clarified April 25, 2005. The parties agreed to mutual dates, May 26 and 27, 2005, for review of a large quantity of Gulf Power documents at multiple

sites in the Pensacola region. Gulf Power filed a Motion for an Additional Extension of Time to respond to Motion to Compel answers to interrogatories and document requests which was granted to August 1, 2005. *Order FCC 05M-32*, released July 14, 2005.

These multiple extensions of time will not extend any of the procedural and hearing dates. *See Order FCC 05M-18*, released April 1, 2005.

### **Motion to Compel**

On **July 11, 2005**, Florida Cable Telecommunications Association, *et. al.* ("Complainants") filed its instant Motion to Compel Gulf Power Company's Response to Interrogatories and Requests for Production of Documents ("Motion to Compel"). After receiving an extension of time to respond, on **August 1, 2005**, Gulf Power Company's Response to Complainants' Motion to Compel was filed. *Order FCC 05M-32*, released July 14, 2005. The Rules of Practice do not provide for a Reply pleading, and none is requested. *See 47 C.F.R. § 1.294(b)*.

### **INTERROGATORIES**

#### **Interrogatory No. 2.**

Complainants ask for definition/understanding of "full capacity" as meant by the court in *APC v. FCC*,<sup>2</sup> and to define differences between "full capacity," "crowded," or "lack of capacity."

Complainants ask that Gulf Power be ordered to explain "how exactly it proposes to quantify or measure 'full capacity' on individual poles." Complainants also allege that Gulf Power's answer to Interrogatory No. 2 was "evasive and incomplete" by defining/ explaining "full capacity" as "a pole that cannot host further communications attachments, consistent with Gulf Power's own core use [and other factors]."

Complainants seek an order requiring an answer that Complainants consider to be the correct one that requires an absolute standard of "physical [impossibility]" for any added attachment. Gulf Power's answer is merely stating its position. Gulf Power was not evasive, and will not be required to adopt a definition or meaning which Complainants seek to impose.

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<sup>2</sup> *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, 311 F. 3d 1357 (11<sup>th</sup> Cir. 2002).

### **Interrogatory No. 3**

Complainants ask for justification for Gulf Power's prior identifications of specific poles as being at "full capacity."

Gulf Power answered that poles identified were either at "full capacity" or "crowded;" and promised that "crowded" poles will be further identified upon completion of the Osmose survey.

Gulf Power will not be required to further supplement its answer to Interrogatory No. 3. On the date set for completion of a preliminary survey report, September 30, 2005,<sup>3</sup> Complainants will learn the number of poles alleged to be at "full capacity."

### **Interrogatory No. 4**

Complainants seek to have Gulf Power identify each pole which it contends is at "full capacity" by virtue of there being a buyer of pole space which is "waiting in the wings."

Gulf Power relies on proof of pole "change-outs," and apparently does not rely on identifying individual "buyers waiting in the wings."<sup>4</sup> Gulf Power has the burden of proof on damages, both entitlement and amount. How Gulf Power chooses to present its proof will not be the subject of a compulsory discovery order. Complainants are entitled only to fair notice of Gulf Power's proof and theories of recovery that Gulf Power will rely on at trial.<sup>5</sup> Gulf Power proffers its proof for meeting its burden of proving damages by a preponderance of the evidence. Complainants have no similar burden. Gulf Power need not respond further to this Interrogatory.

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<sup>3</sup> *Order FCC 05M-18, supra* (preliminary report on pole survey).

<sup>4</sup> But Gulf Power responds that where it has changed-out a pole to accommodate a new attacher, a genuine "buyer" had been "waiting in the wings" for space on a "crowded or" full capacity pole.

<sup>5</sup> Provision has been made for trial briefs which require parties to disclose the essentials of their respective evidence and theories. *See Order FCC 05M-18*, released April 1, 2005.

### **Interrogatory No. 5**

Complainants seek the specification/identification of pole space on "full capacity" poles, and identification of utilization of "higher valued use with its own operations."

Gulf Power responds that any space on its poles can be put to a "higher valued use" other than attaching communications cable such as non-regulated communications attachers. Gulf Power has answered the question posed by the Interrogatory. If Gulf Power offers insufficient proof and/or submits non-meritorious legal/economic theory or otherwise fails to meet *APCo/Gulf Power Order* standards, it runs the risk of losing the case on damages. But Gulf Power is not required to respond further to this Interrogatory which it has answered.

### **Interrogatories No. 7**

Complainants seek Gulf Power's "marginal costs" for all poles identified in response to answers to Interrogatories 4 and 5.

Gulf Power contends that marginal costs for each cable attachment equal what the FCC Formula, plus a "charge for grounds and arrestors." Complainants insist on the identification of "actual expenses specifically tied to Complainants' attachments on each pole." As in the question of "full capacity," if Gulf Power offers insufficient proof and or submits non-meritorious legal theory on "marginal costs", it runs the risk of losing on damages. However, Gulf Power will not be required to respond further to this Interrogatory which it has already answered.

### **Interrogatories No. 8**

Complainants seek the identity of other attaching entities on Gulf Power poles besides the Complainants, and seek details concerning the attachers and the attachments.

Gulf Power responded that it will "supplement" this response upon completion of the Osmose survey. As it relates to the Description of Evidence, Gulf Power asserts it has already provided such evidence.

Gulf Power has commissioned a survey and audit of Gulf Power's cable utilized poles. Upon completion, Gulf Power will disclose all CATV attachers, which will include any which are not parties. But that survey is limited to utilized space and capacity. Gulf Power should have business records disclosing the identity of current pole attachers. Gulf Power also should have internal documents identifying attachers paying the FCC Formula. Therefore, Gulf Power must revisit Interrogatory No. 8 and its answers to provide information that it currently possess about users, make-ready costs, and per pole compensation, as that information is requested by this Interrogatory.

Complainants also criticized Gulf Power's Description of Evidence which relies on "evidence concerning make-ready work," and "photographic and engineering evidence depicting attachment arrangements on distribution poles." The inference arises that Gulf Power had such "evidence" at the time it submitted the Description of Evidence. Therefore, providing the information should not be burdensome.

So unless Gulf Power can show it already has done so, **by August 31, 2005**, Gulf Power must itemize the evidence that it contends it has already provided that is referred to in the Description of Evidence.

### **Interrogatory No. 9**

Complainants seek evidence that quantifies/explains the bases of losses caused by cable attachments, and methodology proving such damages. But Gulf Power provided a responsive formula: actual loss equals difference between the rate paid by Complainants and just compensation, plus interest at maximum legal rate. Gulf Power is not claiming damages for any actual loss.

Complainants ask that Gulf Power be ordered to answer Interrogatory No. 9 based upon the 11<sup>th</sup> Circuit standards. But that is not what was asked in Interrogatory No. 9 to which Gulf Power has provided a responsive answer. Nor is Gulf Power required to provide interpretation of a court decision. Gulf Power need respond no further to this Interrogatory.

### **Interrogatory No. 10**

Complainants asks for "just compensation" rate for each pole identified, the basis for calculating the rate, and identity of poles that qualify for a "just compensation" rate.

Gulf Power provided \$40.60 per pole as the just compensation annual rate. But Gulf Power is exploring other rates through experts and expects to reach a rate that is less than \$40.60. Gulf Power committed to identify "precise rate" and "methodology" when it discloses its testifying evaluation expert in accordance with *Order FCC 04M-42*, released December 20, 2004 (procedural/hearing dates).<sup>6</sup> Gulf Power has committed to identify specific poles after completing the Osmose pole survey. Complainants should receive this information well in advance of the hearing.

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<sup>6</sup> Those procedural and hearing dates were superceded by *Order FCC 05M-18*, released April 1, 2005, *inter alia*: November 18, 2005 exchange of expert summaries; November 28 – December 12, 2005 deposing experts; Osmose audit to be preliminarily reported on September 30, 2005.

The rate of \$40.60 substantially exceeds the FCC Formula rate (estimated 8 to 10 times). Gulf Power admits that \$40.60 is its interim "just compensation" rate (subject to expert revision) and has committed to proffer proof showing that other attaching entities are voluntarily paying the \$40.60 rate. Gulf Power need not disclose facts and methods of calculations leading to a \$40.60 rate.<sup>7</sup> It appears that there is no CATV attacher paying \$40.60 per pole. Gulf Power does not intend to seek that rate in this proceeding. Therefore, evidence of the \$40.60 rate is irrelevant, and Gulf Power need not answer further with respect to this Interrogatory.

#### **Interrogatory No. 11**

Complainants ask for the identity of persons having knowledge of Gulf Power's Description of Evidence (January 2004) and/or its Alternative Cost Methodology (December 2004). Instructions to Interrogatories defined "identify" as meaning name, title, address, and telephone numbers.

Gulf Power provided a chart listing 13 names, which excludes legal counsel, experts and personnel used by Osmose in its audit. It appears that the names are incomplete, and that the "identity" information was not provided. Gulf Power must revisit Interrogatory No. 11 and provide the information requested. There is no privilege or cause shown for not disclosing names and identifying data concerning such names (except for clerical personnel). So there is no reason to withhold the requested information. Gulf Power must revisit and more fully respond to this Interrogatory.

#### **Interrogatory No. 12**

Complainants ask for the identity of persons who gave information or assisted in Gulf Power's answers to the Interrogatories.

Gulf Power has partially objected but has provided a chart listing seven names with employees. The basis for the partial objection is "unduly burdensome." For reasons stated above regarding identity of names, Gulf Power must revisit Interrogatory No. 12 and provide the information requested. There is no privilege or cause shown for not disclosing names and identifying data concerning such names (except for clerical personnel).

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<sup>7</sup> Gulf Power has effectively waived ever charging Complainants a \$40.60 rate, and has retained expert assistance to calculate a lesser rate that meets "just compensation" (expected to be an amount more than the FCC Formula rate). Therefore, there will not be any discovery ordered such as billing statements sent to attachers paying \$40.60.

#### **Interrogatory No. 14**

Complainants request the disclosure of any party admissions or default (laches) on the part of Complainants that Gulf Power intends to rely upon and possibly use against Complainants.

It is a mixed question of law and fact since Gulf Power must form a belief that an action, inaction, or statement constitutes a legal admission. Also, the request is so broad as to include actions and inactions, as well as statements by corporate officers, that Gulf Power would be required to seek out and provide such hypothetical and speculative admissions (if any). Gulf Power will not be required to seek out speculative admissions.

#### **Interrogatory No. 15**

Complainants request Gulf Power to "identify and describe" every communication (oral, written or otherwise) with anybody, relating to annual pole rental charges or make-ready work from 1998, but limited to the poles that are owned or controlled by Gulf Power.

Gulf Power objects on grounds the Interrogatory is overly broad and burdensome, and not reasonably calculated to lead to discovery of admissible evidence. Gulf Power also suggests that Interrogatory No. 15 is asked by Complainants to annoy or oppress Gulf Power and its agents.

Gulf Power's objection is sustained because the nature of this Interrogatory is a "fishing expedition". It is burdensome to search for such an extensive universe of sources. Possibilities are unlimited and the "net" would cover even inane and/or unreliable speculations and intentions which were not thought through. Also, it appears from Gulf Power's response that Complainants already possess all agreements, invoices, remittances and correspondence, and that make-ready work documents were offered and rejected in document inspection. Gulf Power need not further respond to this Interrogatory. But it cannot be concluded that Complainants intended to annoy or oppress Gulf Power.

#### **Interrogatory No. 16**

Complainants request identity and description of all attachers to Gulf Power poles since 1998. Gulf Power provided 67 names of businesses but no other information.

Complainants demand additional information as specified by its definition of "identity" to include name, principal business address, phone number, and name of chief executive officer. Gulf Power must provide such additional information to the extent that

it is know or available in records, or must direct Complainants to the specific documents already produced that contain such information.<sup>8</sup>

#### **Interrogatory No. 17**

Complainants request the identity/description of Gulf Power surveys, audits or Pole counts conducted since 1996, and additional details about any which are identified.

Gulf Power identified pole counts in 1996, and in 2001. These were joint counts over Gulf Power's service area conducted with telephone companies. Details of count methodology were provided in Gulf Power's response. Count reports show the number of Gulf Power attachments on telephone poles; number of telephone attachments on Gulf Power poles; number and company name(s) of CATV attacher(s). Gulf Power provides names of persons that worked for Gulf Power on each of the two pole counts.

Complainants demand additional information on identity in addition to the names provided (particularly telephone numbers). Complainants also want "identity" data on other than Gulf Power employees who conducted the counts (Bell South/Sprint). Gulf Power must provide identify information to the extent that it is known or readily available.

#### **Interrogatory Nos. 18, 19**

Complainants requests the identity of all poles having "cross-arms, extension arms, or boxing arrangements" (both sides of pole), and parties to boxing arrangements.

Gulf Power objects on grounds of overly broad interrogatory not calculated to lead to discovery of admissible evidence. Complainants argue that such evidence could be used defensively to counter any claim of "full capacity." Complainants also argue that evidence on extension arms and the like are relevant to a pole's capacity. But Complainants have no burden of proof. Gulf Power has the burden of proceeding with its proof of poles having "full capacity" that qualify for rates above the FCC Formula. If the evidence is not reliable, Gulf Power's burden may not be met. Gulf Power intends to rely on only "actual present pole conditions (not future, hypothetical pole conditions)," and will not submit evidence of poles that are moving targets. Therefore, speculative, burdensome evidence of arm extensions and the like will not be compelled. Gulf Power's objection is sustained.

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<sup>8</sup> Cf. Interrogatory No. 8 above.

**Interrogatory Nos. 20, 21, 22, 23**

Complainants request information on poles that have been "changed-out" since 1998 in order to accommodate pole attachments that include: (1) Complainants' CATV attachments; (2) other CATV attachments; (3) non-CATV attachments; (4) non-communication attachments; and (5) all change-outs on account of meeting Gulf Power's "core electricity service requirements."

Gulf Power objects on grounds that the request is overly broad and contends that the information is not relevant to discovery under the damages issue in this case. But as Complainants point out, the business practices of "change-out" (replacement and/or substitute poles) seems to be regularly used to meet individual pole needs arising from "full capacity," "crowding," or "other buyer in the wings." Such evidence sought on "change outs" appears to be the evidence that Gulf Power would rely on in attempting to meet its burdens of proof. The evidence meets the test of relevant discovery (47 C.F.R. § 1.311 *et seq.*), and Gulf Power has not shown any undue burden in making production.

Gulf Power's damages will be limited to per pole charges above the FCC Formula rate, only for those poles on which Complainants' have CATV attachments. Since this hearing is limited to "reasonable compensation" from rates charged for Complainants' CATV attachments, it would be unnecessary to consider evidence of change-outs relating to non-CATV attachments. Therefore, Gulf Power shall respond and provide additional information only in response to Interrogatory No. 20.

Gulf Powers objects on grounds of relevancy to providing evidence in response to Interrogatories Nos. 21, 22 and 23 are sustained and Gulf Power is not required to respond at this time to Interrogatories Nos. 21, 22 and 23. Even if this discovery evidence were considered in some way "relevant" to Complainant's defense case-in-chief, the Federal Rules of Evidence provide for excluding relevant evidence. *See* FRE 403 (exclusion of relevant evidence on grounds of confusion or waste of time).

This ruling also will preclude Gulf Power from introducing objectionable irrelevant evidence in its case-in-chief at hearing.

**Interrogatory No. 24**

Complainants request the identity/description of occasions that Gulf Power has refused to change-out a pole, giving explanation of situation and reasons given for the refusals.

Gulf Power objects on grounds of non-relevancy, and also contends that the request is overly broad. Since this case is limited to issue of any damages that Gulf Power can prove with respect to CATV pole attachments of Complainants, Gulf Power must provide answers relating to any change-out refusals that relate only to Complainants pole attachments on Gulf Power's poles. Evidence of change-out refusals for other attachers who are not parties to this case need not be produced.

But Gulf Power will be precluded from introducing such objectionable evidence at hearing. See FRE 403 (exclusion of relevant evidence on grounds of confusion or waste of time).

#### **Interrogatory No. 25**

Complainants seek an explanation of the process of changing-out a pole, from the time of an attacher's request to completion.

Gulf Power objects to answering this Interrogatory because it is overly broad and will not produce relevant evidence that might be admissible. For reason stated above, the "change-out" procedures that relate to CATV cable attachments are relevant, and Gulf Power appears to rely on "change-out" evidence to support its claim for damages. Therefore, Gulf Power must furnish the information requested regarding steps and procedures for completing a "change-out" for a CATV attacher. It may be answered by demonstrating through responsive documents each step of the procedure, such as work orders, parts inventories, diagrams, renderings, billings, and the like.

#### **Interrogatory No. 26**

Complainants request Gulf Power to identify all persons responsible for development of pole "make-ready" and "change-out" procedures, and identity of persons who determine when a "make-ready" or "change-out" is needed.

Gulf Power objects on grounds that the Interrogatory is overly broad, and not calculated to lead to admissible evidence. The information may be needed to depose person(s) with knowledge of procedures and determinations relating to "make-ready" and "change-out." But Gulf Power need not list each person in the chain of events. Gulf Power may designate a person or persons who can be deposed on the information requested. Such person must be "identified" in accordance with Interrogatory definition, and the person(s) qualifications must be provided in writing. Complainants must complete any such deposition in accordance with the discovery schedule which terminates on December 16, 2005.

### **Interrogatory No. 28**

Complainants request information on "shared" or "pooled" poles in the form of an inventory of usable poles that are not totally owned or controlled by Gulf Power.

Gulf Power has reserved an objection on grounds of vagueness, but answered that it shares some in-service poles with Bell South, GTC and Sprint pursuant to joint use agreements. Gulf Power appears to have fully answered Interrogatory No. 28. The burden of proof rests with Gulf Power to prove it has poles that are at "full capacity" and which carry Complainants' CATV attachments. It is in Gulf Power's interest to identify as many "full capacity" poles in its inventory, whether owned directly or used pursuant to joint agreements. However, Gulf Power need not further respond to this Interrogatory.

### **Interrogatory Nos. 29, 30**

Complainants seek pole by pole accounting for "change-outs" due to lack of capacity, including the date(s) determinations of "lack of capacity" were made. Complainants also seek explanation of "every instance" of "change-out" on a pole to which Complainants' CATV were attached, where the change was made at Gulf Power's expense in order to accommodate Gulf Power equipment (transformer).

Gulf Power objects because the nature of the work does not involve the kind of record keeping that would reconstruct actions taken as requested by Interrogatories 29 and 30. A pole has "lack of capacity" whenever another attachment cannot be made. Field workers ride the line and make on-the-spot decisions concerning capacity, and make on-the-spot change-outs as fast as possible. It would be time consuming and wasteful of resources to attempt to reconstruct actions of the line workers. Gulf Power is not required to respond further to Interrogatories 29 and 30.

### **Interrogatory No. 31**

Complainants request information on any implementation of "Recommendations" contained in "Gulf Power's distribution Studies" and load planning documents produced in discovery in January 2005.

Gulf Power objects on grounds of vagueness, undue burden, and relevance. Apparently, such distribution studies were referred to in Gulf Power's Distribution Studies. But while such subjects as reserving space for future use and measurements indicating amount of space required may be important for business planning, they become vague and speculative for the damages issue set for adjudication in this hearing. Gulf Power's objection is sustained.

**Interrogatory No. 34**

Complainants ask if Gulf Power informs prospective and existing attachers when pole space is reserved for future use for its own "core electricity operation." If the answer is "Yes," Gulf Power should identify/describe all such reservations and notifications to attachers since 1998.

Gulf Power answers "Yes," and replies that prospective attachers are provided access to Gulf Power's "spec plate" prior to attaching.

Gulf Power has provided partial information which it must supplement. If the information is reasonably obtainable or retrievable, Gulf Power must provide it. Since Gulf Power has the burden of proof, Gulf Power has an incentive to supplement its answer to Interrogatory No. 34. Otherwise, it may be precluded from introducing such evidence.

**Interrogatory No. 35**

Complainants ask if Gulf Power contends that it requires reserved pole space that is occupied by Complainants. If the answer is "yes," Gulf Power should identify such pole space and identity poles.

Gulf Power has not answered the question. It appears to have been an oversight. Gulf Power shall supplement its answer and respond.

**Interrogatory No. 36**

Complainants ask if Gulf Power contends that it may charge Complainants the costs of modifications sought by Gulf Power, or sought by any other attacher.

Gulf Power responded by citing statutory language on authorized charges for "rearrangement or change-out costs of modifications." Complainants consider this an evasive answer and notes that the statute quoted [47 U.S.C. § 224(h)(i)] does not refer specifically to "pole change-outs."

The reference to statutory language and conclusive answer that Gulf Power complies with a statute is not sufficiently responsive. Gulf Power must answer the questions directly ("yes" or "no") and explain its policy and practice of charging attachers when modifications are made on poles to which the attachments are made.

**Interrogatory No. 37**

Complainants ask if Gulf Power contends that payment of make-ready costs by an attacher is insufficient to reimburse Gulf Power its "marginal costs."

Gulf Power answered: "Yes," referring to its response to Interrogatory No. 7 (marginal costs equal FCC Formula yield, plus charge for "grounds and arrestors".) Then adds: the *APCo* decision uses "marginal costs" interchangeably with "Cable Rate." Complainants disagree and assert that under *APCo*, more than "marginal costs" are paid under the FCC Formula.

This is an ongoing debate on interpretation which cannot be resolved in pretrial discovery. The parties are reminded that Gulf Power bears the burdens of proof on the fact issue of "marginal costs" in connection with showing damages above the FCC Formula. Neither party need state more at this time with respect to Interrogatory No. 37.

**Interrogatory No. 38**

Complainants request Gulf Power to identify/describe documents that support claim for pole rental in excess of marginal cost.

Gulf Power objects to an Interrogatory asking for a reiteration of legal principles and facts and documents already addressed in the case of *APCo* and its related FCC proceedings. The Presiding Judge agrees. The parties are required to exchange Trial Briefs in advance of hearing which shall address much of what Complainants are seeking by this Interrogatory. This Interrogatory requires no further response.

**Interrogatory No. 39**

Complainants ask for Gulf Power's methodologies, formulae, cost accounts used in calculating pole attachment rental in excess of marginal cost, and the identity of all persons associated with developing the methodologies.

Gulf Power responds that it will provide this information in accordance with *Order* FCC 05M-18, released April 1, 2005. Complainants have requested foundation evidence for Gulf Power's pole rate exceeding the FCC Formula in excess of marginal cost and that information will be forthcoming. *See Order* FCC 05M-18, *supra*. Gulf Power has answered and its objection is sustained.<sup>9</sup>

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<sup>9</sup> The Presiding Judge has earlier attempted to flush out "methodologies" and recalls that the parties have from time to time stated their preliminary positions.

**Interrogatory No. 40, 41, 42**

Complainants request Gulf Power to produce all documents that relate to, or refer to negotiations with communications attachers, joint user attachers, and non-joint user attachers on rates that exceed the FCC Formula rates for CATV and for telecommunications.

Gulf Power refers to numerous documents which were identified for Complainants by Bates references (1,483 pages of documents). Complainants complain that there is no analysis made of specific categories of such documents as to the information sought by Complainants. But inconvenience of document analysis is not sufficient cause to require Gulf Power to analyze documents that it furnished to Complainants in discovery. There has been extensive pre-hearing discovery, and Complainants are experienced companies that have analyzed for at least the past four years business documents that relate to costs of pole attachments. Therefore, there will be no further response required of Gulf Power to this interrogatory.<sup>10</sup>

**Interrogatory No. 44**

Complainants request that Gulf Power describe/explain its "understanding" and its "application" of "Sales Comparison Approach" as that phrase is used in Gulf Power's "Preliminary Statement on Alternative Cost Methodology."

Gulf Power responds that it looks to other sales of identified property that is "free of government regulation." With respect to explaining application of the comparative sales approach, Gulf Power will make such disclosure when it exchanges statements of testifying experts who are proffered for deposition and cross-examination.<sup>11</sup> Since this question of "application" will be answered before in future schedule pre-hearing discovery, there will be no further response required of Gulf Power to this interrogatory.

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<sup>10</sup> Parties and counsel are urged to confer amongst themselves to narrow these fundamental questions.

<sup>11</sup> See Order FCC 05M-13, released April 1, 2005. (Gulf Power constantly and erroneously refers to the "Presiding Judge's December 17, 2004 Order" which was superceded by Order FCC 05M-13, *supra*. The parties are reminded that the date for exchange of summaries of expert testimony is November 18, 2005, and expert depositions are to take place between November 28 and December 12, 2005. *Id.*

**Interrogatory No. 45, 46**

Complainants request identity of rates paid to Gulf Power by joint-users, rates paid by Gulf Power to other joint-user pole owners, and an explanation of the respective methodologies.

Gulf Power has provided charts listing pole attachment rates, which appear to be responsive information. Complainants consider price charts alone as not being fully responsive to Interrogatories No. 45 and 46 because there is no information provided by Gulf Power regarding its methodologies used to calculate the respective rates. Gulf Power must provide responsive information on methodology/formulas used to calculate the ILEC rate information provided.

**Interrogatory No. 47**

Complainants request an explanation of Gulf Power's understanding of "Current Replacement Cost Approach" as that terminology appears in its Alternative Cost Methodology, and explain application to calculating pole attachment rates.

Gulf Power responds by identifying "Current Replacement Cost" as a fair market value proxy which relies on current (not historic) costs. Gulf Power commits to disclosing application of its approach through disclosure of experts in accordance with *Order* FCC 05M-18, *supra* (the current operative scheduling order).

Gulf Power has provided information which is directly responsive to Interrogatory No. 47 as written. Since the question of "application" will be disclosed upon exchange of experts' statements prior to depositions, there will be full and timely pre-hearing disclosure. Therefore, there will be no further responses required of Gulf Power to this interrogatory.

**Interrogatory No. 48**

Complainants request an explanation of Gulf Power's understanding of "Federal Concessions Leasing Model" as used in Alternative Cost Methodology and its application to calculating rates.

Gulf Power responds by identifying the Leasing Model as an "evaluation method proposed by Gulf Power's evaluation experts," and explains that it uses federal government methodology for valuing property for which there is no market or which does not have "easily ascertainable market value." Gulf Power agrees to explain applications upon disclosure of experts and exchange of testimony summary in accordance with *Order* FCC 05M-18, *supra*. Therefore, Complainants are not being refused discovery. There will be no further response required of Gulf Power at this time to this Interrogatory.

## Documents

There have been thoughtful and significant questions asked in Complainants' Interrogatories. Most have been answered candidly but warrant supplemental answers.

But the document requests appear to be overly broad and if literally compelled to produce, would require an unduly burdensome compliance. Nonetheless, Gulf Power still has made considerable document production. In view of prior expansive document discovery, Complainants will be limited as to future document discovery.

The damages issue regarding attachment rates began in mid-2000 when Gulf Power notified Complainants that the annual pole rate would increase from a range of \$5 – \$6.20 per pole to \$38.06. *See Gulf Power Cable Order* (DA 03-1555), 18 FCC Rcd 9599 (May 13, 2003). The Enforcement Bureau ("Bureau") found the \$38.06 rate to be "unjust and unreasonable". The Bureau concluded that "Gulf Power fails utterly to justify its proposed annual pole attachment rate of \$38.06 using the FCC Cable Formula."<sup>12</sup> The Bureau authorized Complainants to file a complaint. On July 10, 2000, Complainants filed their Complaint which asks the Commission to: (1) declare that Gulf Power acted unreasonably and that a rate of \$38.06 is unlawful; (2) establish a rate only slightly greater than the formula at \$6.20 per pole; (3) order Gulf Power to cease and desist from terminating contracts. *Id.* That complaint was granted by the staff on May 13, 2003, after considering extensive pleadings. Complainants and Gulf Power have been litigating pole attachment costs for the past four years prior to institution of this formal adjudicative hearing.

Between July 10, 2000, when Complainants filed their complaint, and September 27, 2004, the date of issuance of the *Hearing Designation Order* – a period of more than four years – there has been substantial productions of relevant Gulf Power business documents. There also was substantial regulatory data already on file at FERC relating to Gulf Power's transmission of power through power lines. The information filed by Gulf Power at FERC was important and considered to be sensitive. On August 9, 2000, when Gulf Power filed a Response to Complainant's Complaint, Gulf Power also requested confidential treatment of competitively sensitive, proprietary records relating to "operating options [and] costs," and asking that only the Commission staff have access. *Gulf Power Order* at 4. Certain of the information claimed to be confidential was lodged with FERC. *Id.* FERC refused Gulf Power's request for confidential treatment, and the information was made available to the public on the internet. *Gulf Power Order* at n. 18.

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<sup>12</sup> The FCC Cable Formula is the methodology the Commission developed to calculate the maximum allowable pole attachment rate a specific utility may charge a cable operator providing cable services. *Gulf Power Order* at fn. 45.

The Commission thereafter denied as moot Gulf Power's motion to protect replacement cost methodologies which was being disclosed to Complainants by Gulf Power from its internal documents. *Id.* As a result, there are numerous, significant business documents of Gulf Power that have been in the possession of Complainants prior to issuance of the *Hearing Designation Order*.

After issuance of the *Hearing Designation Order*, by agreement, on May 27 – 28, 2005, Complainants conducted an extensive document review in Gulf Power's services territory, and subsequently copied numerous documents. Gulf Power describes the event in its Response:

During the May 28-23 document review, Gulf Power made available for copying and inspection at its headquarters more than ten banker's boxes of documents, including but not limited to pole count information from 1996 and 2001, pole attachment applications and permits for all attachers, and contracts and correspondence files for all attachers. Gulf Power also made available at its Engineering & Construction district offices countless make-ready work orders (maintained in storage and/or large file drawers in the various offices). Complainants spent a day-and-a-half reviewing documents at Gulf Power's headquarters, but did not accept the invitation to inspect documents at the various Engineering & Construction offices.

See Gulf Power's Response at 2 n. 2. In the course of this recent on-site document review, Gulf Power produced an estimated 2000 pages of documents. Thousands more pages of documents were also made available to Complainants for inspection in Gulf Power's service locations. But without explanation, Complainants chose not to inspect documents that were proffered by Gulf Power in its field offices.

Complainants' current document request appears to be a sweep to obtain "all" other documents not already possessed by Complainants that might in any way relate to Gulf Power's business practices in enlarging pole capacity, and its cost methodology.<sup>13</sup> By way of illustration, **Request No. 1** asks for "all documents that relate to "any of the facts or allegations" that are described in "Gulf Power's or Complainants' pleading" in File No. PA 00-004 and this Action. This is a broad request which if fully responded to would require evidence being searched for and produced that would not be calculated to lead to "discovery of relevant facts, for the production and preservation of evidence for use at the hearing, or for both." 47 C.F.R. § 1.311.

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<sup>13</sup> The Commission has preliminarily concluded that a rate of \$38.06 per pole is "unjust and unreasonable." Gulf Power has the burden to convince the Presiding Judge and the Commission of reasonableness. Complainants do not have any corresponding burden to disprove that \$38.06 is not reasonable, or to prove an alternative reasonable rate. Therefore, the documents requested by Complainants should be narrowly focused, particularly at this stage of trial preparation.

In response to **Request No. 2**, Gulf Power has again offered to make available for inspection ten categories of documents, which will be made available upon reasonable request for inspection at Gulf Power locations in Florida. It is unclear whether Complainants will utilize this opportunity for further document search.

**Request No. 3** seeks all documents reviewed, produced or written by any consultant or expert witness who are studying pole attachments. Those documents used by testifying experts will be produced by both parties on or before November 18, 2005. *See Order FCC 05M-18, supra*. Similarly, **Request Nos. 32, 33, 34** seek premature expert discovery. The parties must negotiate a scope of documents used by experts to be exchanged prior to depositions, and Gulf Power offers to work with Complainants for agreed upon documents relating to experts at an appropriate time. The parties are urged to cooperate.

**Request No. 4** is a broad and burdensome request. The "make ready orders" sought by Complainants were earlier made available for inspection at various locations and Complainants declined to inspect. Gulf Power continues to extend the invitation. Therefore, Complainants have effectively waived any right to having those documents sought out and produced by Gulf Power.

**Request Nos. 6, 7** seeks documentary information about cross arms, **Request No. 9** seeks documents on change-outs, and **Request No. 11** seeks documents identifying line crew members. Gulf Power already has produced documents responsive to these requests. And Gulf Power has also provided information in answers to interrogatories on the same subjects. Again, Complainants seem to be straining to search for every paper that even remotely relates the discovery issues. Such requests are burdensome and time wasteful.

Many documents were obtained, reviewed and analyzed by Complainants since May 2005. This follow-up document discovery seems to engage in an inordinately wasteful flyspeck, in light of several significant factors: (1) the four years of discovery and examination of Gulf Power's business documents for which Gulf Power unsuccessfully sought protection from disclosure; (2) the fact that experts retained by Gulf Power will submit summaries of testimony incident to their depositions taken in accordance with the Federal Rules of Procedure;<sup>14</sup> and (3) documents that are relied on by Gulf Power to support its case-in-chief must be exchanged before the hearing. Damages should be able to be adjudicated without an abusive excess of documentary evidence. *See* FRE 403 (exclusion of wasteful relevant evidence).

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<sup>14</sup> In addition to exchanging summaries of testimony, the parties shall be required to identify all documents seen by testifying experts in connection with formulating testimonial opinions that are subject to cross examination.

### **Recent Development**

In a recent development while the instant Motion to Compel and Response are under advisement, on August 2, 2005, Complainants filed a Motion to Dismiss. Among other things, Complainants cite to an 11<sup>th</sup> Circuit conclusion that the dispute is only over methodology used to calculate "just compensation," merely a "legal issue" that does not require an evidentiary hearing. Complainants consider the case to be now ripe for motion to dismiss on the law without a hearing, which seems to negate a need for further document discovery of the scope undertaken by Complainants.

Nonetheless, while the recently filed Motion to Dismiss goes forward, Complainants document discovery remains under supervision of the Presiding Judge who has authority under the Commission's rules of practice to regulate the course of this proceeding, including discovery. *See* 47 C.F.R. § 1.243(f). That authority includes narrowing burdensome and wasteful discovery. By now, Complainants should be knowledgeable of Gulf Power's choices of methodologies for assessing costs to enable a narrowly focused document request. In view of the extensive document discovery made since 2000, production of documents at this point should be limited to documents which are reasonably expected to be used in depositions or in cross-examination of key witnesses,<sup>15</sup> and which have not already been produced.<sup>16</sup>

### **RULINGS**

IT IS ORDERED that in accordance with the foregoing analyses and rulings, Complainants' Motion to Compel filed on July 11, 2005, IS GRANTED in part and IS DENIED in part.

### **Interrogatories**

IT IS FURTHER ORDERED that by **August 26, 2005**, Gulf Power shall file Supplement to Answers to Interrogatories in accordance with the above rulings.

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<sup>15</sup> Of course, Complainants still have the option of visiting Gulf Power offices to inspect and copy documents.

<sup>16</sup> For example Gulf Power attached to its Response a copy of its Description of Evidence and represents that it has produced the evidence described or referred to in the Designation. That evidence should be itemized and inventoried.

### Documents

IT IS FURTHER ORDERED that by **August 31, 2005**, Complainants shall file a Status Report on Document Discovery.


IT IS FURTHER ORDERED that *in lieu* of a Status Report on Document Discovery, Complainants may elect to file instead **on August 31, 2005**, a Motion to Compel Production of Documents Needed to Prepare for Hearing.

IT IS FURTHER ORDERED that before filing any further Motion to Compel Production of Documents, Complainants shall inspect documents offered for inspection by Gulf Power, seek to negotiate a narrowed request for further documents, and limit any Motion to Compel documents that are likely to be used in deposition and/or at hearing, and/or that are needed for testifying experts to formulate opinions.<sup>17</sup>

IT IS FURTHER ORDERED that Gulf Power shall file a Response by **September 7, 2005**, to Complainants' Status Report, or shall file a Response to Complainants' Motion to Compel Production of Documents Needed to Prepare for Hearing.

IT IS FURTHER ORDERED that whichever responsive pleading that Gulf Power files, the pleading must include a comprehensive overview accounting of the categories of documents furnished to Complainants since 2000, an estimate of the number of documents in each category, and efforts made to negotiate completion of document discovery.

FEDERAL COMMUNICATIONS COMMISSION<sup>18</sup>

A handwritten signature in black ink, appearing to read "Richard L. Sippel", is centered on the page.

Richard L. Sippel  
Chief Administrative Law Judge

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<sup>17</sup> Meeting these conditions must be represented as a preamble to any Motion to Compel Document Production that Complainants may elect to file on August 31, 2005.

<sup>18</sup> Courtesy copies of this *Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.